# APPENDIX A

## Opinion of District Court in Principal Case

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No: 29951

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CONTINENTAL CASUALTY COMPANY OF ILLINOIS, Subrogee of WJRT, INC., OHIO FARMERS INSURANCE COMPANY, an Ohio corporation, and PHOENIX ASSURANCE COMPANY, a New York corporation, Subrogee of Charles and Larue Pemberton,

*Plaintiffs,*

vs.

WESTINGHOUSE ELECTRIC CORPORATION, and EDWIN L. WIEGAND CORPORATION, jointly and severally,

*Defendants.*

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OPINION

(Filed March 13, 1970)

This is a subrogation action by three plaintiff insurers against two defendants, Westinghouse Electric Corporation and Edwin L. Wiegand Corporation (hereinafter referred to as Westinghouse and Wiegand), to recover moneys paid by them as a result of a fire at WJRT-TV, a television station with related offices, located at Flint, Michigan.

The two-count complaint pleads breach of express and implied warranties and negligence of both defendants in furnishing WJRT-TV a heating-air conditioning unit manufactured by Westinghouse, containing a component heating element manufactured and supplied by Wiegand—which heating-air conditioning unit caused the fire and consequent losses complained of.

There are certain undisputed facts: Westinghouse manufactured and sold the combination heater-air conditioner unit, which was installed in a secretary's office in a newly constructed administrative wing at WJRT. (Fifteen other like units were installed in the building.) One of the component parts of the unit was a 3,000 wattspiral electric resistance heater, manufactured by Wiegand and sold to and installed by Westinghouse in the unit in question. The said unit was installed under the window in the room, which was used principally as a storeroom and which was not occupied by anyone until the week preceding the fire. The fire occurred at about 8:00 a.m. on Saturday, March 5, 1966. During that work week, i.e., Monday through Friday, March 4, the room was used by an accountant; Friday, he left the room at approximately 5:30 to 6:00 p.m.

It is stipulated that Charles and Larue Pemberton owned the building occupied by WJRT-TV as tenant; that plaintiffs are possessed of the subrogation rights; and, that the amounts paid by the plaintiffs are as follows:

| | |
|---|---|
| Continental Casualty Company ..... | $205,083.68 |
| Ohio Farmers Insurance Company ..... | $ 33,309.99 |
| Phoneix Assurance Company ..... | $ 8,882.66 |

It is further stipulated that if plaintiffs are entitled to recover, they are entitled to recover in the amounts stated.

The parties are agreed that there was arcing in the heating element manufactured by Wiegand. The dispute between the parties centers on what caused the fire and, by the same token, what caused the arcing.

It is the theory of the plaintiffs, joined by Westinghouse, that the heating element manufactured by Wiegand was defective when delivered to Westinghouse by reason of a defective or "marginal" weld of an end pin and the heating wire, or that there was present some foreign material in the area of the weld. They contend that because of the defective weld or foreign substance an internal arc developed at the weld, generating a tremendous amount of heat and energy within the sheath, causing a breakdown of the magnesium oxide insulation so that the arc reached the sheath, causing the expulsion of extremely hot gasses and molten metal particles, which then came into contact with the polyurethane filter, igniting the same and causing the ensuing fire damage.

It is the theory of the defendant Wiegand that Westinghouse was negligent in the design and manufacture of the unit in the following respects: that it improperly employed a flammable polyurethane filter; that it utilized flammable ABS plastic in its grilles; that the air flow over the thermostatic sensing bulb was restricted; that the chamber of the unit was improperly designed; and, that the over-temperature limit switch was improperly located upstream of the heating element. From these premises Wiegand reasons that the fire originated external to the heating element; that the limit switch was defective and did not work, as a result of which intense heat was generated causing the arcing; and, that the arcing did not occur at the weld.

There was considerable dispute as to whether the drapes, which could be drawn across in front of the unit, were in a closed position. Under the evidence we conclude that they were open at the time of the fire. As for the limit switch, we conclude that it was in working order, especially in view of the fact that months later, it responded to tests at Chromalox Laboratories, albeit at a higher calibration than would have been normal. If an external fire had caused the heating element to rupture, and we speak now of a buildup of some 1600 degrees, there would have been severe damage evident in the control panel. There was, however, no damage inside the control panel, located immediately to the left of the heating chamber; the paper diagram of the wiring circuitry is intact, with a slight browning along the right side thereof; there is no damage to the wiring in the control area; and, there is no evidence of melting or burning of bakelite parts, or of the aluminum face plate.

The x-rays of the cold pin and the heating wire near the rupture or eruption point indicate that a part of the weld portion of the heating wire is missing. With regard to this weld, defendant Wiegand's proofs were to the effect that the heating wire and the cold pin were brought together by a spot weld. This part of the manufacturing process was performed manually by an operator working on a normal production schedule of 400 welds per hour. Only one out of each hundred heating elements was subjected to a pull test.

The probabilities are, on the evidence before us, that the spot weld, connecting the heating wire to the cold pin, was defective on the unit in question, and we so find. We further find that because of the defective weld an arcing developed inside the sheath, leading in turn to a rupture

of the sheath and the expulsion, at high velocity, of particles of molten metals, hot magnesium oxide and gases which, coming into contact with the polyurethane filter and the plastic grille, caused them to burn, setting fire to the drapes and, by progression, the other material in the room and building.

On the evidence we hold that the conduct of Wiegand was the primary and efficient cause of the injury, i.e. that it was the sole, primary and proximate cause of the fire.

With respect to Westinghouse, we hold that it was its duty to use due care in constructing the unit and to see to it that it was properly equipped so that it could safely be used for its intended purpose and would not be a menace to those who used it. While we hold that the defect in the heating element supplied by Wiegand was not such as to have been discoverable by the exercise of due care by Westinghouse and that, therefore, its failure to discover the defect was not negligence, we conclude, under the authority of the leading Michigan case on the subject, *Piercefield* v. *Remington Arms Co.*, 375 Mich. 85, that Westinghouse is liable to the plaintiffs for breach of implied warranty of the unit of its fitness for its intended purpose and use.

Under *Piercefield* the burden is upon the plaintiffs in a case like this to "prove (a) the defect of manufacture upon which he relies, and (b) injury or damage caused by or resulting from such defect." In *Piercefield* the Court cited *Picker X-Ray Corp.* v. *General Motors Corp.*, 185 A.2d 919. We quote from that case what we consider applicable here:

> "* * * Implied warranty recovery is based upon two factors: (a) The product or article in question has been transferred from the manufacturer's possession

while in a 'defective' state, more specifically, the product fails either to be 'reasonably fit for the particular purpose intended' or of 'merchantable quality', as these two terms, separate but often overlapping, are defined by the law; and (b) as a result of being 'defective', the product causes personal injury or property damage."

We consider Michigan, in *Piercefield,* to have adopted the strict tort doctrine under the guise of the implied warranty theory. See Wayne Law Review, Vol. 15, page 1558. We hold that the plaintiffs have carried the burden of proof on the claim of implied warranty as to each defendant and on the claim of negligence as to the defendant Wiegand.

Under the above findings of fact and conclusions of law we hold that plaintiffs are entitled to recover from both defendants in the amounts stipulated, together with interest at the rate of 5% per annum from May 18, 1967 to the date of entry of judgment.

This resolves the issues between the plaintiffs and the defendants. There remain the cross-claims of the defendants. These will be considered and resolved upon motions or trial as may be found appropriate.

Dated: March 13, 1970.

STEPHEN J. ROTH
*United States District Judge*

## APPENDIX B

### Opinion of District Court on Cross-Claims

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONTINENTAL CASUALTY COMPANY OF ILLINOIS, Subrogee of WJRT, INC., OHIO FARMERS INSURANCE COMPANY, an Ohio corporation, and PHOENIX ASSURANCE COMPANY, a New York corporation, Subrogee of Charles and Larue Pemberton,

*Plaintiffs,*

—v.—

WESTINGHOUSE ELECTRIC CORPORATION, and EDWIN L. WIEGAND CORPORATION, jointly and severally,

*Defendants.*

RULING ON DEFENDANT WESTINGHOUSE'S MOTION FOR A SUMMARY JUDGMENT ON ITS CROSS-CLAIM AND ON DEFENDANT WEIGAND'S MOTION FOR A NEW TRIAL OR TO AMEND THE FINDINGS OF THE COURT

(Filed July 18, 1970)

This is a subrogation action by three plaintiff insurers against two defendants, Westinghouse Electric Corporation and Edwin L. Weigand Corporation (hereinafter referred to as Westinghouse and Weigand), to recover moneys paid by them as a result of a fire at WJRT-TV,

a television station with related offices, located in Flint, Michigan. The complaint alleged breach of warranty and negligence on behalf of each defendant in furnishing the TV station with a heating-air conditioning unit manufactured by Westinghouse, containing a component heating element manufactured and supplied by Weigand—which heating-air conditioning unit caused the fire and consequent losses complained of.

On March 13, 1970 this court entered its opinion containing certain findings of facts on each of the charges against each defendant and holding that on the evidence "the conduct of Weigand was the primary and efficient cause of the injury, i.e. that it was the sole, primary, and proximate cause of the fire," at p. 5, and "the plaintiffs have carried the burden of proof on the claim of implied warranty as to each defendant and on the claim of negligence as to the defendant Weigand," at p. 6. The court then stated that "[t]his resolves the issues between the plaintiffs and the defendants. There remain the cross-claims of the defendants. These will be considered and resolved upon motions or trial as may be found appropriate," at p. 6.

Defendant Westinghouse now moves for a summary judgment on its cross-claim against Wiegand. Defendant Weigand has filed a motion for new trial or to amend the findings of the court.

At the beginning of the trial it was stated upon the record that the principal case would be tried, and if necessary, the cross-claims would be subsequently tried. The court stated in its opinion that the cross-claims would be considered and resolved upon motions or trial as might be found appropriate. Defendant Weigand's motion for a new trial or to amend the findings of the court is based on allegations that the court should not have found any facts relating to the

issues in the cross-claims and that it ignored the testimony of some of Weigand's witnesses. In trying the issues in this case it was necessary for the court to make certain specific findings of fact relative to all of the charges in plaintiffs' complaint. It mattered not that these findings might effect the outcome of the cross-claim brought by both defendants against one another. Defendant Weigand is bound by the findings of fact made on the issues already decided and will be estopped from any attempt to relitigate those issues which were necessarily raised at trial. See *Ward* v. *Flex-O-Tube Co.,* 194 F.2d 500 (6th Cir. 1952).

> On the question whether parties are bound by a judgment, the formal arrangement of parties on the record is unimportant, so that if co-parties on the record were, in fact, adversaries on an issue, and the issue was actually litigated, and they had full opportunity to contest it with each other; either on pleadings between themselves and the plaintiff, or on cross-pleadings between themselves, co-parties are concluded by adjudication of that issue in a subsequent controversy between each other. *Fidelity & Casualty Co. of New York* v. *Federal Express,* 136 F.2d 35 (6th Cir. 1943).

Nor will defendant Weigand's charges that the court ignored the testimony of some of its witnesses justify granting a new trial. As stated in (a) of Fed. R. Civ. P. 52 "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Although defendant Weigand here brings his motion under (b) of Rule 52 it is not sufficient to attack the court's reliance on demeanor testimony to merely show that the court did not subscribe to the moving parties' theories and gave more weight to the testimony of other witnesses. The findings of

the court are sufficiently definite as to each issue raised in the complaint to substantiate the general conclusions of the court as to negligence and breach of warranty. See generally, *NLRB* v. *Dinion Coil Co.*, 201 F.2d 484 (2d Cir. 1952) on demeanor evidence, and *Filter* v. *Mohr*, 275 Mich. 230 (1936) on the weight to be given to physical facts.

The basic principle of the right to indemnity was also stated in the *Fidelity & Casualty of New York* v. *Federal Express* case, *supra:*

> It is the general rule that whenever the wrongful act of one person results in liability being imposed on another, the latter may have indemnity from the person actually guilty of the wrong. 136 F.2d 35, at 40.

Thus where the assembler is liable to plaintiff solely because of failure to discover a defect, and here that defect was undiscoverable making Westinghouse guilty of breach of warranty of fitness for a particular purpose rather than of negligence, he will be entitled to indemnity from the maker of the defective part. *Tromza* v. *Tecumseh Prods. Co.*, 378 F.2d 601 (3d Cir. 1957). See also Frumer & Friedman, 3 Products Liability §44.02; *Husted* v. *Consumers Power Co.*, 376 Mich. 41 (1965); and *Indemnity Insurance Co. of North America* v. *Otis Elevator Co.*, 315 Mich. 393 (1946).

For the reasons stated above defendant Weigand's motion for a new trial or to amend the findings of the court is hereby DENIED and defendant Westinghouse's motion for a summary judgment on its cross-claim against Weigand is hereby GRANTED.

Appropriate orders may be submitted.

STEPHEN J. ROTH
*United States District Judge*

# APPENDIX C

## Opinion of the Sixth Circuit

No. 20,831

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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CONTINENTAL CASUALTY COMPANY OF ILLINOIS,

*Plaintiff,*

EDWIN L. WIEGAND CORPORATION,

*Defendant-Appellant,*

—v.—

WESTINGHOUSE ELECTRIC CORPORATION,

*Defendant-Appellee.*

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Before:

WEICK, CELEBREZZE and BROOKS,

*Circuit Judges.*

ORDER

(Filed April 12, 1971)

This appeal is from the granting of a motion for summary judgment. Upon consideration of the record, the briefs of the parties and the oral arguments of counsel, it is concluded that the District Court's resolution of the issues is correct and that no error intervened in the proceeding.

It is therefore ORDERED that the judgment of the District Court is affirmed for the reasons set forth in the memorandum of Judge Stephen J. Roth.

Entered by order of the Court

CARL W. REUSS

*Clerk*

## APPENDIX D

### Colloquy Between Trial Court and Counsel

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[3]*

Detroit, Michigan
Tuesday, October 28, 1969
Morning Session

The Clerk: 29951. Continental Casualty Company of Illinois, Subrogee of WJRT, Inc., et al., versus Westinghouse Electric Corporation and Edwin L. Wiegand Corporation.

The Court: Are the parties ready?

Mr. Kohl: Defendant Westinghouse is ready.

Mr. Doelle: Defendant Wiegand is ready but I find there has been some confusion about my demand for jury on my cross-claim against Westinghouse and I would like to insist upon a jury on the cross-claim. I have no objection to your Honor trying the other matter but I would like a jury on the cross-claim.

The Court: Mr. Kohl?

Mr. Kohl: In reply I would like to say, your Honor, in the first place there is no basis whatsoever for the filing of the cross-claim which was done within a matter of the last several days.

Mr. Doelle: Over six I think to be exact.

Mr. Kohl: Without benefit of order, without a semblance of permission and the cross-claim and jury demand attached thereto I submit [4] to the Court are a complete nullity in this case.

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* Figures in brackets are page numbers of typewritten transcript of the trial proceedings herein.

Mr. Doelle: There is no requirement of an order on a crossclaim. There was none when Westinghouse filed one against me, your Honor.

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Mr. Kohl: I am afraid that is not true and the record and court file will reflect what I have said.

The Court: I was under the understanding, perhaps misunderstanding, that no jury trial would be asked for by any of the parties.

Mr. Kohl: No jury.

The Court: And I have notes on the April 29, 1968 gathering of the clan in Flint.

Mr. Doelle: That is correct.

The Court: (Continuing) In which I thought I was told nobody would ask for a trial by jury and my notes show Mr. Davies was there, Mr. Kohl was there and Mr. Doelle was there.

Mr. Doelle: I think that is true. May I say I did not until I had this last pre-trial confrontation with Mr. Kohl when he indulged in so much vitriol in your Honor's chambers against Wiegand I did not think that a jury was essential but I do feel after listening to him in there [5] that I would like to have a jury determine the merits and demerits of his argument and I do think they should be presented to a jury. This was filed on October 6, and under the circumstances I think Mr. Kohl and myself might more properly be evaluated by a jury in our respective claims. That is my feeling. If he had been quite lacking in emotion that day before your Honor I might not have demanded a jury but I thought, well, if this is a sample of Mr. Kohl I better have a jury look at it.

The Court: We have some jurors who have been called to service before some of the other judges and I would

think sometime this morning yet we can gather enough to serve you.

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Have the exhibits all been marked?

Mr. Davies: Many of the exhibits have been marked, not all of them. I don't have them all here yet.

The Court: What I am trying to see is what we can accomplish while we are waiting for a jury. I would like any suggestions that you may have along that line. I would like to do something. I have some other matters I can attend to in chambers but I don't like to see you fellows sitting idly by.

Mr. Moesta: Unless we can make some effort to see if we can agree on the damages which would eliminate substantial trial time. [6] All these losses were paid by insurers and we presented Mr. Kohl—I think Mr. Kohl has agreed to stipulate to damages, Mr. Doelle hasn't. We furnished him with copies this morning and he was going to see whether he could stipulate and we might pursue that aspect of it.

The Court: What do you think of that, Mr. Doelle, do you think we can make some time?

Mr. Doelle: I think probably we can. I just had them presented to me here and I haven't had a chance to look them over but I should be happy to and I think we might do something in that connection.

The Court: Are there other matters which could be useful in shortening the time of trial that you might stipulate to? As I understand the crux of the entire matter is the cause of the fire, isn't it?

Mr. Doelle: That's right. That is what we are really trying. I don't know what you have in the—

The Court: If there are matters that you can stipulate

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to without in any way giving up your version of the causation I would hope you would, between now and the time we get a jury in here. I would think we can get one in here this morning yet. I will have to wait until they select jurors in a couple of the other courts before I have some leftovers, which is the best I can serve you this morning.

[7] Mr. Doelle: That's all right.

Mr. Kohl: May I be heard?

The Court: Yes.

Mr. Kohl: May it please the Court, I say this very seriously on behalf of Defendant Westinghouse. It is my position that this case was to be tried by the Court, non-jury. We have had a number of hearings on this case before this Court. There has been nothing new, different or surprising. We all have been in the courtroom and before the Court on many occasions, every lawyer that is involved in this case and it is my understanding very definitely that in the various hearings that have been conducted before your Honor that there was complete agreement insofar as the conduct of this trial is concerned, insofar as trial by court or jury is concerned, and as I say it is my position on behalf of my client that this cause should be tried by the Court.

We discussed it in great detail and it was agreed upon by all counsel that this was the type of cause that if tried by the Court would take considerably less time to try than if tried to a jury. It was discussed with the Court. The Court, I recall clearly, asked every lawyer, each of us as we appeared before your Honor if there was to be a jury trial and there was [8] no equivocation, no "maybe"

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or "possibly" or "we will wait and see." There was nothing of that nature and I speak only for myself when I say this but my approach to a trial, non-jury, depending on the case, is not necessarily the same as might be the situation before a jury.

I think it was discussed and agreed in accordance with the Court's comments of a few moments ago that actually when you reduce this case down the questions involved are basic and could be resolved with a maximum of dispatch. I do not know to what extent plaintiffs have been influenced by the belief that we were to try this case non-jury, but I have to believe to some degree, and I have planned to try my case accordingly and I respectfully suggest to the Court that there is no timely demand for a jury trial and that in fact this is the type of case where the basic issues are clear and distinct and that for the reasons I have stated to the Court, without going into further detail, I respectfully submit to the Court that this case should be tried non-jury.

Mr. Doelle: Your Honor, on October 6, Mr. Kohl received my crossclaim and demand for jury. He was aware of it at that time. If he wished to come in and move to strike the demand that should have been done prior to today. He had that opportunity. I say again that if Mr. Kohl had conducted himself in chambers at the last pre-trial in a [9] temperate manner as he did when he was addressing your Honor here, I would have had no suggestion—

The Court: He couldn't very well do that on that occasion if you remember, because he had a temperature.

Mr. Doelle: I think that is right; he had a higher temperature at that time. He was suffering from the flu as I remember it. But I got back to the office and I thought,

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"Well, if he feels so strongly against Wiegand as he expressed himself in chambers, I do feel that a jury should weigh and evaluate this claim of his" and I would like to have them do it.

Mr. Kohl: I say to the Court that an order entered by this Court on a preliminary pre-trial order dated April 30, 1968, on page 2, item (c) Amendments to Pleadings by application for leave extended to September 9, 1968.

Mr. Doelle: That is correct. There isn't any question about it.

The Court: Well, let's not belabor the point. It's a discretionary matter and Mr. Doelle wants a jury and he will have a jury, I guess.

Mr. Moesta: Do I understand that is a jury just to try the issue on his crossbill?

The Court: Yes.

[10] Mr. Moesta: We are not prepared to try our case to a jury and, Mr. Kohl, I agree with that, we prepare differently when we are doing to try it to a jury.

The Court: That brings me back to you, Mr. Kohl. Do I understand your alternative to be a request for a continuance or not?

Mr. Kohl: No, it's not, your Honor.

The Court: Why don't you get together in the jury room which presently is not occupied and see what matters of stipulation you can enter and meanwhile we will see how many jurors we can round up.

—66a—

We will be in recess until that time.

(A recess was taken until 2:00 P.M.)

The Court: After conference with counsel this morning before we recessed, the Court is of the opinion that the case in main should be tried and the matter of the cross-claims will either be disposed of by the decision in the case in main or in any event if it requires further proceedings will be tried separately.

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